Othman bin Ali v Telekom Malaysia Bhd

HIGH COURT (KUALA TERENGGANU) — CIVIL APPEAL NO 12–27 OF 2000
AHMAD MAAROP J
4 MARCH 2004

Administrative Law — Rules of natural justice — Right to be heard — Whether employee given opportunity to explain second reason in charge — Whether injustice occasioned

Labour Law — Employment — Dismissal — Law applicable — Employment Act 1955 or Telecommunication Services (Successor Company) Act 1985 — Employment Act 1955 ss13(2) and 15(2) — Telecommunication Services (Successor Company) Act 1985 ss 2, 3(1), 9(1) and (2) — Public Officers (Conduct & Discipline) (Chapter "D") General Orders 1980, GO 21(1), (3), (4), 25 and 26(3)

Labour Law — Employment — Absenteeism — Absent without leave for more than two consecutive days — Work performance — Failure to improve — Whether dismissal valid — Employment Act 1955 ss 13(2) and 15(2) — Telecommunication Services (Successor Company) Act 1985 ss 2, 3 (1), 9(1) and (2)

The appellant/plaintiff ('the appellant') sued the respondent/defendant ('the respondent') for wrongfully dismissing him from service. The reason for the appellant's termination was for his failure to provide proper explanation for his absence from work for more than two consecutive days. The sessions court judge dismissed the appellant's claim. Hence this appeal against the decision.

The issues before this court were: (a) whether the appellant's absence and his subsequent dismissal for lack of proper explanation should be considered pursuant to the Employment Act 1955 ('the EA') or provisions under other laws; (b) (if the answer is the latter) whether the appellant's dismissal was wrongful; and (c) whether the respondent violated the rules of natural justice when the respondent failed to provide an opportunity to the appellant to explain his absence from work.

Held, allowing the appeal with costs:

(1) The Telecommunication Services (Successor Company) Act 1985 ('Act 322') was enacted to facilitate the privatisation of the government's Telecommunication Department as well as the employees whom opted to joint the respondent. The Minister in exercising the powers conferred under s 3(1) of Act 322 made the following orders, *inter alia*, that all property rights and liabilities in respect of telecommunication services, including all rights and liabilities relating to the staff were transferred to the respondent with effect from 1 January 1987 (see paras 15, 18 and 19).

(2) Under General Order 21(1), absence without leave or prior permission or without reasonable cause renders a member of the public service of the Federation, like the appellant before the privatisation, liable to disciplinary action. General Order 21(4) provides that in situations of absence without leave or prior permission or without reasonable cause for a period exceeding seven working days, an officer shall be liable to disciplinary proceeding with a view to dismissal and reduction in rank

in accordance with General Order 26. The offending officer still stood a chance for lesser punishment under General Order 26(3) upon his representation to the Disciplinary Authority. On the other hand, absence without leave or prior permission or without reasonable cause for a period not exceeding seven working days does not necessarily result in the dismissal. Under General Order 21(3), the Disciplinary Authority is empowered to initiate disciplinary action not with a view to dismissal and may impose such penalty as it may deem fit (see paras 24 and 25).

(3) The terms and conditions of service under s 9(2) of Act 322 cover a number of aspects governing the relationship between the respondent and the former employees of the Telecommunication Department, Malaysia, including their rights and duties in matters of discipline, leave and medical benefits, which included the legal provisions relating to the same. Matters of discipline included the procedures to be applied when an employee is absent from work without leave. As such, by s 9(2) of Act 322, the appellant must be employed by the respondent 'on terms and conditions of service not less favourable than the terms and conditions of service to which he was entitled to' immediately before joining the respondent (see paras 21 and 22).

(4) In applying the provisions under ss 13 and 15 of the EA in dealing with the appellant's absence from work and entitling and employer to dismiss an employee without notice for absence without leave for two consecutives days, the respondent failed to comply with the mandatory standard provided under s 9(2) of Act 322, the appellant was made subject to procedures which were less favourable than the procedures relating to the same matter which he was entitled to immediately before joining the respondent. Such failure rendered the decision to dismiss the appellant illegal and/or procedurally improper (see para 30); *Council of Civil Service Unions & Others v Minister for the Civil Service* [1985] AC 374 referred.

(5) Adhering to the ordinary words of s 15(2) of the EA in interpreting the requirement to inform provided thereunder would result in absurdity or repugnance. The language of the section must be varied or modified to give it 'force and life' and to achieve what must have been the intention of the legislature. It was not the intention of the legislature that the requirement to inform under s 15(2) of the EA must be fulfilled even if the employee concerned is incapable of doing so because of his unstable physical or mental condition (see para 45).

(6) The rules of natural justice and fair play demanded that the material facts supporting the second actual reason for the appellant's dismissal be included in the charge against the appellant. As far as the appellant was concerned, from the respondent's letters dated 10 May 1993, 11 May 1993 and 11 June 1993, the only charge against him was being absent from work on the four material days. He had given his explanation to the said 'charge' which was found by the respondent to be unreasonable. As far as the appellant was concerned, he was dismissed on the said 'charge'. The charge did not mention anything about the facts relating to the second reason for his dismissal. It was obvious that the appellant was dismissed for something he was not 'charged' with, and in respect of which he was not given the chance to explain. This clearly amounted

to a violation of the rules of natural justice which had occasioned injustice and grave prejudice to the appellant (see para 56); *Board of Trustees of the Maradana Mosque v Badiuddin Mahmud & Another* [1967] 1 AC 13 and *Lau Liat Meng v Disciplinary Committee* [1968] AC 391 referred.

[Bahasa Malaysia summary

Perayu/plaintif ('perayu') telah mendakwa responden/defendan ('responden') kerana telah memecat perayu daripada perkhidmatannya dengan salah. Alasan bagi pemecatan perayu adalah kegagalan perayu untuk memberi penjelasan yang sesuai bagi ketidakhadiran perayu ke kerja lebih dari dua hari berturut-turut. Hakim mahkamah sesyen telah menolak tuntutan perayu. Rayuan ini adalah berdasarkan keputusan tersebut. Isu-isu di hadapan mahkamah ini adalah (a) sama ada ketidakhadiran perayu dan pemecatannya selepas itu kerana kegagalan perayu memberikan penjelasan yang sesuai harus dipertimbangkan berdasarkan peruntukan Akta Kerja 1955 ('AK') atau peruntukan-peruntukan akta-akta lain; (b) (sekiranya jawapan adalah yang kemudiannya) sama ada pemecatan perayu adalah salah; dan (c) sama ada responden telah melanggar rukun keadilan asasi apabila responden gagal memberikan peluang kepada perayu untuk memberi penjelasan mengenai ketidakhadirannya.

Diputuskan, membenarkan rayuan dengan kos:

(1) Akta Perkhidmatan Telekomunikasi (Syarikat Pengganti) 1985 ('Akta 322') telah digubal untuk membantu penswastaan Jabatan Telekomunikasi kerajaan termasuk menjaga kepentingan kakitangan-kakitangan di bawah jabatan tersebut yang telah memilih untuk bekerja bersama responden. Menteri, dalam melaksanakan kuasanya yang diberikan dibawah s 3(1) Akta 322, telah membuat perintah-perintah seperti berikut, antara lain, kesemua hak harta dan liabiliti yang berkaitan perkhidmatan telekomunikasi, termasuk kesemua hak dan liabiliti kakitangan-kakitangan yang berkaitan perkhidmatan telekomunikasi akan dipindahkan kepada responden dari 1 Januari 1987 (lihat perenggan 15, 18 dan 19).

(2) Di bawah Perintah Am 21(1), ketidakhadiran tanpa kebenaran atau keizinan awal atau tanpa sebab yang munasabah akan menyebabkan kakitangan awam Persekutuan, seperti perayu sebelum penswastaan, boleh dikenakan tindakan disiplin. Perintah Am 21(4) memperuntukkan bahawa ketidakhadiran tanpa kebenaran atau keizinan awal atau tanpa sebab yang munasabah untuk tempoh masa lebih daripada tujuh hari bekerja, kakitangan tersebut hendaklah dikenakan tindakan disiplin dengan pandangan untuk pemecatan dan penurunan pangkat menurut Perintah Am 26. Pegawai yang bersalah masih mempunyai satu peluang untuk hukuman yang ringan dibawah Perintah Am 26(3) atas representasinya kepada Pihak Berkuasa Disiplin. Sebaliknya, ketidakhadiran tanpa kebenaran atau keizinan awal atau tanpa sebab yang munasabah untuk tempoh masa kurang daripada tujuh hari bekerja tidak semestinya mengakibatkan pemecatan. Di bawah Perintah Am 21(3) Pihak Berkuasa Disiplin, mempunyai kuasa untuk memulakan tindakan disiplin tanpa pandangan untuk pemecatan dan boleh mengenakan penalti yang dianggap sesuai (lihat perenggan 24 dan 25).

(3) Terma-terma dan syarat-syarat perkhimatan dibawah s 9(2) Akta 322 merangkumi beberapa aspek yang menguasai perhubungan antara responden dan kakitangan-kakitangan dahulu Jabatan Telekomunikasi, Malaysia, termasuk hak-hak dan kewajipan dalam perkara-pekara disiplin, cuti dan faedah perubatan, yang merangkumi peruntukan undang-undang terhadap perkara tersebut. Perkara-perkara disiplin merangkumi prosedur-prosedur yang harus dipakai apabila seseorang kakitangan tidak hadir untuk kerja tanpa kebenaran. Maka, menurut s 9(2) Akta 322, responden hendaklah mengambil perayu untuk bekerja 'on terms and conditions of service not less favourable than the terms and conditions of service to which he was entitled to' sejurus sebelum perayu bersama responden (lihat perenggan 21 dan 22).

(4) Dalam memakai peruntukan di bawah ss 13 dan 15 AK kepada ketidakhadiran perayu untuk kerja tanpa kebenaran dan membolehkan sesuatu majikan memecat pekerjanya tanpa notis untuk ketidakhadiran tanpa kebenaran selama dua hari berturut-turut, responden telah gagal untuk memenuhi standard mandatori yang diperuntukkan di bawah s 9(2) Akta 322, perayu telah tertakluk kepada prosedur yang kurang baik berbanding prosedur yang sama yang mana perayu berhak sejurus sebelum bersama responden. Kegagalan seumpama itu menyebabkan keputusan untuk memecat perayu menyalahi undang-undang dan/atau tidak betul dari segi prosedur (lihat perenggan 30); *Council of Civil Service Unions & Others v Minister for the Civil Service* [1985] AC 374 dirujuk.

(5) Berpegang kepada perkataan biasa s 15(2) AK dalam mentafsirkan keperluan untuk memaklumkan yang telah diperuntukkan, akan menyebabkan kemustahilan atau ketidaksesuaian. Bahasa seksyen tersebut hendaklah diubah atau diubahsuai untuk memberi 'force and life' dan mencapai apa yang diniatkan oleh pengubal undang-undang. Bukan niat penggubal undang-undang bahawa keperluan untuk memberitahu di bawah s 15(2) AK tersebut hendaklah dipenuhi sungguhpun pekerja tersebut tidak berupaya berbuat demikian memandangkan keadaan fizikal atau mentalnya adalah tidak stabil (lihat perenggan 45).

(6) Kaedah-kaedah keadilan asasi dan keadilan yang saksama mewajibkan bahawa fakta-fakta material yang menyokong alasan kedua sebenar dalam pemecatan perayu seharusnya dimasukkan dalam tuduhan terhadap perayu. Setakat penglibatan perayu, surat-surat responden yang bertarikh 10 Mei 1993, 11 Mei 1993 dan 11 Jun 1993, hanya terdapat tuduhan ketidakhadiran perayu untuk kerja selama empat hari. Perayu telah memberi penjelasannya kepada 'tuduhan' tersebut yang telah didapati oleh responden sebagai tidak munasabah. Mengikut perayu, perayu telah dipecat bedasarkan 'tuduhan' tersebut. Tuduhan tersebut langsung tidak menyatakan fakta-fakta yang berkaitan alasan kedua pemecatannya. Adalah jelas bahawa perayu telah dipecat untuk sesuatu yang mana perayu tidak dituduh, dan di mana perayu langsung tidak diberi peluang untuk menjelaskannya. Ini jelas adalah pelanggaran kaedah-kaedah keadilan asasi yang telah menyebabkan ketidakadilan dan prejudis yang teramat kepada perayu (lihat perenggan 56); *Board Of Trustees Of the Maradana Mosque v Badiuddin Mahmud & Another* [1967] 1 AC 13 dan *Lau Liat Meng v Disciplinary Committee* [1968] AC 391 dirujuk].

Notes

For cases on breach of the rules of natural justice, see 1 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 712–722.

For cases on dismissal, see 8(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 849–873.

For dismissal, see 7 *Halsbury's Laws of Malaysia*, para [120.087].

For breach of the rules of natural justice, see 9 *Halsbury's Laws of Malaysia*, para [160.107].

Cases referred to

Becke v Smith (1836) 2 M&W 191 (refd)

Board Of Trustees Of The Maradana Mosque v Badiuddin Mahmud & Another [1967] 1 AC 13 (refd)

Council of Civil Service Unions & Others v Minister for the Civil Service [1985] AC 374 (refd)

Lau Liat Meng v Disciplinary Committee [1968] AC 391 (refd)

Lim Moh Joo v Public Prosecutor [1970] 2 MLJ 113 (refd)

Sukma Darmawan Sasmitaat Madja v Ketua Pengarah Penjara, Malaysia & Anor [1999] 2 MLJ 241 (refd)

Legislation referred to

Advocates and Solicitors Ordinance [Sing] s 30(7)

Assisted Schools & Training Colleges (Special Provision) Act 1960 [UK] s 6(i)

Assisted Schools & Training Colleges (Supplementary Provisions) Act 1961 [UK] s 4

Employment Act 1955 ss 13, (2), 15, (1), (2), Pt III

Evidence Act 1950 s 57(1)(a)

Federal Constitution art 132(2)

Motor Vehicles (Third Party Risks and Compensation) Ordinance 1960 [Sing] s 17(2), (3)

Peraturan-Peraturan Pegawai Awam (Kelakuan Dan Tatatertib) 1993

Postal Services (Successor Company) Act 1991 s 8(2)

Public Officer (Conduct & Discipline) (Chapter "D") General Orders 1980 G O 21, (1), (3), (4), 25, 26, (3)

Railway (Successor Company) Act 1991 s 8(2)

Telecommunication Services (Successor Company) Act 1985 ss 2, 3, (1), (6), 9, (1), (2)

Dato' Victor Isaacs (Isaacs & Partners) for the appellant

Saifudin Osman (Wan Abd Muttalib & Co) for the respondent

Ahmad Maarop J:

THE APPELLANT'S CASE

[1] The appellant (plaintiff) sued the respondent (defendant) in the Sessions Court Kuala Terengganu for wrongfully dismissing him from its service. In his statement of claim the appellant prayed for damages, interests and costs.

[2] The trial in the Sessions Court Kuala Terengganu commenced on 28May 1996 and was continued on 20 August 1997, 10 November 1997,

4 August 1998, 22 June 1999 and 8 May 2000. On 8 May 2000, the hearing was continued by another sessions court judge who had taken over from the sessions court judge who had heard the case earlier but had gone on transfer. By then the respondent had closed its case. On that date, the succeeding sessions court judge heard submission by counsel for the appellant and counsel for the respondent and adjourned the hearing to 28 May 2000. On 28 May 2000, the sessions court judge dismissed the appellant's claim with costs. Dissatisfied with that decision, the appellant filed an appeal to this court.

[3] On the direction of the court, counsel for the appellant and counsel for the respondent submitted written submissions. They were allowed to supplement their submissions orally in open court or make any clarification thereof.

[4] In the trial in the sessions court, the appellant gave evidence. In addition, he called three other witnesses to support his claim. Three witnesses gave evidence for the respondent.

[5] In his evidence the appellant testified that he started his service with Jabatan Telekom Malaysia on 23 October 1972, as an instructor with a salary of RM230 per month. According to him, when Jabatan Telekom Malaysia was privatised in 1987 he joined Syarikat Telekom Malaysia Bhd ('the respondent'). While working for the respondent his last drawn salary was RM1,447. According to the appellant, before his service was terminated he was sick and that he had been admitted in the ward in the hospitals in Kuala Terengganu, Kota Bharu and Kuala Lumpur. According to him, he could not concentrate on his work and he was always depressed and weak. He said he had been sick off and on since 1969. The appellant did not deny the fact that he did not go to work on 4, 5, 7 and 8 May 1993, but said that he was sick on those days:

> Sebelum saya tidak pergi kerja pada 4, 5, 7, 8 Mei — perasaan saya sebelum itu saya rasa susah hati, sedih, tak bermaya, rasa benci kepada saya di Pejabat.
>
> Sebelum ini, saya bercerai dengan isteri saya pada 1992. Saya tinggal seorang diri.
>
> Saya ada terima rawatan ketika itu di Hospital Besar, Kuala Lumpur dan Hospital Besar, Kuala Terengganu.
>
> Saya ada makan ubat, sentiasa makan ubat.
>
> Litium Carbonate
>
> Largatil and Atale.
>
> Masa makan ubat — saya boleh bekerja ... sakit datang secara tiba-tiba ... rasa sedih — Syarikat Telekom Malaysia Bhd tahu tentang hal ini.
>
> Hari baik saya kerja, hari tak sihat — masuk wad
>
> Syarikat Telekom Malaysia Bhd tahu hal ini.
>
> Ada sijil penghargaan daripada Telekom — muka 7, 8 — IDP2
>
> Saya setuju Syarikat Telekom Malaysia Bhd puas hati dengan kerja saya.
>
> Walaupun tahu saya sakit, tak beri amaran … ada beri leave untuk pergi ke hospital dan bayar untuk rawatan itu.
>
> *Pada 4, 5, 6 dan 8 … saya sakit teruk … susah hati, sedih, rasa orang benci saya, tak boleh tanggung material akibat ambil ubat berlebihan.*

Sebelum notis penamatan diberi Syarikat Telekom Malaysia Bhd ada bawa saya ke panel doktor ... adakah saya patut dirujuk kepada Medical Board — pada 1992.

(Emphasis added.)

[6] According to the appellant, on 10 May 1993 he received a letter dated 10 May 1993 from En Mohd Noor bin Hassan, Penolong Pengurus Unit Kejuruteraan ORT Selangor Timur ('SD1') asking him to show cause why he was absent from work on the 4, 5, 7 and 8 May 1993. The content of the letter is as follows:

TUNJUK SEBAB KETIDAKHADIRAN KE PEJABAT

Adalah dilaporkan bahawa tuan telah tidak datang bertugas pada 4, 5, 7 dan 8 Mei 1993. Manakala pada 3 Mei tuan hanya kelihatan antara jam 9.30 pagi hingga 10 pagi dengan tujuan mengisi borang pertukaran.

Oleh yang demikian melalui surat ini adalah dikehendaki memberikan sebab sebab dalam tempoh tujuh (7) hari dari tarikh surat ini, mengapa tindakan tatatertib tidak boleh diambil ke atas tuan.

Sekiranya tuan gagal memberikan sebarang sebab yang munasabah dalam tempoh yang telah ditetapkan di atas, pihak Syarikat akan menganggap tuan tidak mempunyai sebarang sebab yang munasabah dan tindakan tatatertib akan di ambil ke atas tuan.

Sekian, Salam Hormat

[7] The appellant said that before he could give a reply within the stipulated period of seven days, he received another letter dated 11 May 1993 from SD1 prohibiting him from coming to work with effect from the date of the said letter. The letter states:

Lanjutan daripada surat kami bil 71 ORT ST/KEJ SULIT bertarikh 10 Mei 1993 ketidakhadiran tuan untuk bertugas tanpa bercuti atau sebarang sebab yang munasabah. Adalah dimaklumkan bahawa tuan adalah dengan ini dilarang menghadirkan diri untuk bertugas mulai dari tarikh surat ini sehingga satu keputusan mengenai kes ini tercapai.

[8] The appellant sent his show cause letter dated 14 May 1993 by hand and it was received by the respondent's clerk on duty on the same date. In the said letter the appellant explained why he was absent:

Sebab-sebab tidak hadir ke pejabat

Merujuk surat tuan bertarikh 10 Mei 1993 Ruj 71 ORT ST/KEJ SULIT. Sebab-sebab saya tidak hadir di pejabat pada hari-hari Selasa, Rabu, Jumaat dan Sabtu iaitu 4, 5, 7 dan 8 Mei 1993 beralasan seperti berikut:

(1) *Keadaan fizikal & mental pada hari-hari tersebut tidak begitu stabil dan tenteram mungkin kerana saya mengambil ubat yang berlebihan.*

(2) *Saya tidak dapat menumpukan sepenuh perhatian pada kerja saya.*

(3) *Pada hari-hari tersebut saya tidak boleh memandu dan mengawal kenderaan saya.*

Saya berharap kenyataan-kenyataan yang saya berikan memuaskan pihak tuan. Terima kasih.

(Emphasis added.)

[9] Subsequently, the appellant received a letter dated 11 June 1993 ('the termination letter') informing him that his explanation in his show

cause letter was not reasonable and that his service with the respondent was terminated pursuant to s 13(2) of the Employment Act 1955 with effect from 11 June 1993. The termination letter was signed by Hj Mohktar bin Yaacob, Ketua Bahagian, Bahagian Sumber Manusia, Telekom Malaysia Bhd, Ibu Pejabat Kuala Lumpur ('SD2').

[10] In his evidence the appellant also stated that he had served Jabatan Telekom Malaysia and Syarikat Telekom Malaysia for 21 years. At the time his service was terminated he was 43 years old and he still had 12 years of service left. The appellant also said that when his service was terminated he was not paid any gratuity or any termination benefit.

LIABILITY

[11] Through his counsel, the appellant argued that his service was wrongfully terminated. He contended that he had given reasonable explanation for his absence from work and that the respondent had failed to consider the fact that he was sick on the dates on which he was absent and indeed he had been sick off and on as he was suffering from Bi Polar illness.

[12] In reply, counsel for the respondent submitted in substance that the respondent was entitled to terminate the appellant's service under s 13(2) of the Employment Act 1955 because he was absent from work for more than two consecutive days. He also argued that the burden was on appellant to prove that he was wrongfully dismissed from service and that the appellant had failed to adduce the necessary evidence to discharge that burden.

[13] In my view the crucial issue which the court has to decide is the law applicable to the appellant in a case of alleged absence from work. The question is whether the provisions under the Employment Act 1955, particularly ss13 and 15 were applicable, or whether there were provisions under other laws which were applicable?

[14] Counsel for the respondent relied on the provisions under ss 13 and 15 of the Employment Act 1955. Indeed, it appears to me that submission of counsel for the appellant was also based on similar provisions. I think the answer lies in other legal provisions, not under the Employment Act 1955. I will begin the search for those legal provisions by considering a very material fact which even the respondent did not dispute. That material fact is that Jabatan Telekom Malaysia was privatised in 1987. In this connection the evidence of the appellant is pertinent. In his evidence the appellant said:

> Saya mula khidmat:
>
> *23 Oktober 1972 dengan Telekom Malaysia. Mula bekeria — sebagai instruktor di Jabatan Telekom Jalan Gurney, Jabatan Telekom Malaysia.*
>
> Gaji: RM230 sebulan.
>
> *Selepas itu, pada tahun 1987 saya menyertai Syarikat Telekom Malaysia Bhd.*
>
> Sebelum saya menyertai Syarikat Telekom Malaysia Bhd, gaji terakhir: RM800.00 sebulan tak pasti angka sebenar.
>
> Gaji baru Syarikat Telekom Malaysia Bhd: RM — tak pasti taksiran: RM1,447.00 — tahun 1993 — April.

Semasa menyertai Syarikat Telekom Malaysia Bhd — saya bertugas sebagai Juruteknik, pada masa dibuang kerja saya kerja Juruteknik.

(Emphasis added.)

[15] That evidence was not disputed or challenged in anyway by the respondent. I therefore conclude as a fact that on 23 October 1972, the appellant started his service with the Telecommunication Department, Malaysia (Jabatan Telekom Malaysia) as an instructor. In other words, before joining the respondent, he was a member of the general public service of the Federation as defined under art 132 of the Federal Constitution. Admittedly, in his evidence the appellant and his witnesses did not mention the exact date in 1987 on which he joined the service of the respondent. But the year 1987 is a highly significant year, not only to the appellant, but also to other employees of the Telecommunication Department, Malaysia and indeed to all the users of telecommunication service in the country. It was the year in which the said Department was privatised. To implement this, the Government put in place the Telecommunication Services (Successor Company) Act 1985 (Act 322). The appellant did not have to prove the existence of Act 322 and the provisions thereunder, as this court must take judicial notice of these under s 57(1)(a) of the Evidence Act 1950. Act 322 is an Act to provide for the vesting of property, rights and liabilities of the Government of Malaysia relating to telecommunication services in a company, to make financial arrangements for that company, to provide for matters relating to staff and for other matter connected therewith. Act 322 also provides for 'transfer date'. Under s 2 of the Act, 'transfer date' means:

> … the date on which all property, rights and liabilities in respect of telecommunication services, other than excepted lands and designated property, to which the Government of Malaysia was entitled or subject to, are transferred to the successor company.

[16] Section 3 of Act 322 provides:

> (1) The Minister may, by order published in the *Gazette*, appoint a transfer date and on such date, all property, rights and liabilities in respect of telecommunication services, other than excepted lands and designated property, to which the Government of Malaysia was entitled or subject to, immediately before that date shall become by virtue of this section property, rights and liabilities of the successor company.

[17] Under section 2 of Act 322 'successor company' means:

> … the company to which all property, rights and liabilities in respect of telecommunication services, other than excepted lands and designated property, to which the Government of Malaysia was entitled or subject to, are transferred to under section 3.

[18] In the exercise of the powers under s 3(1) of Act 322, the Minister made the Transfer Date Order 1987 which came into force on 1 January 1987. This Order was published as PU(A) 27/87. The appellant did not have to prove this as existence of the Order and the provisions thereunder are matters which this court shall take judicial notice of. For convenience the whole of the said Order is reproduced below:

> In exercise of the powers conferred by section 3(1) of the Telecommunication Services (Successor Company) Act 1985, the Minister makes the following order:

1. Citation and Commencement

This Order may be cited as the Transfer Date Order 1987 and shall be deemed to have come into force on the 1st January 1987.

2. Transfer date.

The transfer date on which all property, rights and liabilities in respect of telecommunication services, other than excepted lands and designated property to which the Government was entitled or subject to, are transferred to Syarikat Telekom Malaysia Berhad is the 1st of January 1987.

3. Revocation.

The Transfer Date Order 1986 is revoked.

[19] Paragraph 2 of the Order is very important. It fixed 1 January 1987 as the transfer date. On that date all property, rights and liabilities in respect of telecommunication services (other than excepted lands and designated property), to which the Government of Malaysia was entitled or subject to, were transferred to Syarikat Telekom Malaysia Bhd. So, Syarikat Telekom Malaysia Bhd ('the respondent') was the 'successor company' as defined under Act 322, and with effect from 1 January 1987, all property, rights and liabilities in respect of telecommunication services, to which the Government of Malaysia was entitled or subject to, were transferred to the respondent. Under s 3(6) of Act 322, every right and liability so transferred may be sued on, recovered or enforced by or against the respondent in its own name. In my view, the rights and liability transferred to the respondent under the Order inevitably includes all rights and liabilities relating to the staff of Telecommunications Department, Malaysia. In this connection section 9 of Act 322 provides:

(1) The successor company shall accept into its employment on the transfer date every person who immediately before the transfer date is a member of the staff of the Telecommunications Department, Malaysia, and who was given an option by the Government of Malaysia and has opted to serve as an employee of such company.

(2) Every such person who opts under subsection (1) to serve as an employee of the successor company shall be employed by such company on terms and conditions of service not less favourable than the terms and conditions of service to which he was entitled to immediately before the transfer date.

[20] I must now revert to the evidence adduced by the appellant as set out earlier in this judgment. As I have said earlier that evidence was not disputed or challenged in anyway by the respondent. In my judgment, when that evidence is considered together with the relevant provisions under Act 322 and the Transfer Date Order 1987 which I have alluded to the conclusion is inevitable — the appellant had joined the service of the respondent with effect from 1 January 1987, on which date all property, rights and liabilities in respect of telecommunication services, to which the Government of Malaysia was entitled or subject to, were transferred to the respondent.

[21] This brings me back to the provision under s 9(1) Act 322. It is true that in this case the appellant did not say in his evidence that he was 'given an option by the Government of Malaysia and has opted to serve as an employee of' the respondent. It is also true that he did not adduce evidence

to establish what the details of that option were. However, in the circumstances of this case such omission did not affect the case of the appellant on the question of liability of the respondent. Here the appellant is assisted by the legal provisions which I have referred to, which the court must take judicial notice of. These legal provisions supplement and reinforce the evidence adduced by the appellant by providing the logical explanation as well as the true perspective and significance to the fact that the appellant had joined the service of the respondent in 1987. I have before me the unchallenged evidence of the appellant that he was formerly the staff of the Telecommunication Department, Malaysia, and had joined the service of the respondent in 1987, and that he continued to remain so until he was dismissed by the respondent in 1993. In the absence of any evidence to the contrary adduced by the respondent, I am satisfied on the balance of probabilities that appellant must have opted to serve as an employee of the respondent under s 9(1) of Act 322. Such being my conclusion, by virtue of s 9(2) of Act 322, the appellant shall be employed by the respondent 'on terms and conditions of service not less favourable than the terms and conditions of service to which he was entitled to' immediately before joining the respondent with effect from 1January 1987. The object of this mandatory provision is to my mind, clear. It is enacted as a legal safeguard for government servants (in this case the employees of the Telecommunication Department, Malaysia) who had opted to join the respondent on 1 January 1987. Similar safeguard is also found under s 8(2) of the Postal Services (Successor Company) Act 1991 and s 8(2) of the Railway (Successor Company) Act 1991.

[22] In my view, the terms and conditions of service under s 9(2) of Act 322 cover a number of aspects governing the relationship between the respondent and the former employees of the Telecommunication Department, Malaysia, including their rights and duties in matters of discipline, leave and medical benefits, which in turn must include the legal provisions relating to the same. Matters of discipline would include the procedures to be applied when an employee is absent from work without leave. According to SD3, Ketua Bahagian Sumber Manusia of the respondent at the material time, on the matter of discipline, certain provisions of the Employment Act 1955 were used by the respondent. This is clear from the evidence of SD3 under cross-examination which is as follows:

> Soalan: Adakah peraturan terpakai kepada Syarikat Telekom selepas diswasta?
>
> Jawapan:Sebagai disiplin — kerja ikut Akta Kerja 1955 dan beberapa peraturan atas Akta itu.
>
> Soalan: Telekom Malaysia — ada prosedur tatatertib tersendiri?
>
> Jawapan: Ada, prosedur tatatertib, atas Akta Kerja. …
>
> Soalan: Atas prosedur — setuju, prosedur tatatertib digunapakai daripada G O?
>
> Jawapan: Tidak juga — kita landas kepada Akta Kerja 1955 dan rujuk ss 15(2) dan 13(2) Akta Kerja 1955.

[23] Sections 13(2) and 15(2) of the Employment Act 1955 formed the foundation of submission of counsel for the respondent. Relying on the two sections, he argued that by not coming to work for two consecutive days, the

appellant had breached his contract of service. He contended that holding an enquiry was not a legal requirement before the respondent could terminate the service of the appellant. He further argued that under s 15(2), it was for the appellant to adduce evidence to show that he had reasonable excuse and that he had informed or attempted to inform the respondent of such excuse prior to or at the earliest opportunity during such absence. This, he argued the appellant had failed to do.

[24] Before considering the merit of the above submission, there is another crucial issue which this court must consider. It is whether the procedures provided under ss 13 and 15 of the Employment Act 1955 which were used by the respondent in dismissing the appellant, were not less favourable than the procedures which the appellant was entitled to prior to joining the service of the appellant with effect from 1 January 1987? In other words, the question is whether in applying the provisions under ss 13 and 15 of the Employment Act 1955 in dealing with the appellant's absence without leave for more than two consecutive working days, there was a failure by the respondent to comply with the minimum standard of 'not less favourable' provided under s 9(2) of Act 322. This question arises following what I have said elsewhere in this judgment regarding the implication of s 9(2) of Act 322. In considering this issue, reference must be made to certain legal provisions on matters of discipline applicable to the appellant as an employee of the Telecommunication Department, Malaysia (ie a member of the general public service of the Federation), prior to joining the service of the respondent. In matters of discipline, the legal provisions applicable to the appellant then was under the Public Officers (Conduct & Discipline) (Chapter 'D') General Orders 1980 (General Order 1980 Chapter 'D'), which was repealed and replaced by the Peraturan-Peraturan Pegawai Awam (Kelakuan Dan Tatatertib) 1993 with effect from 15 December 1993. General Order 1980, Chapter 'D' was made by the Yang Di Pertuan Agong in exercise of the powers under art 132(2) of the Federal Constitution. So, being a matter in respect of which the court must take judicial notice, the appellant did not have to prove the existence of the General Order 1980, Chapter 'D' and the relevant provisions thereunder. Under General Order 21(1), absence without leave or prior permission or without reasonable cause shall render a member of the public service of the Federation like the appellant, liable to disciplinary action. Under General Order 21, 'absence' includes failure to be present for any length of time whatsoever at a time and place where the officer is required of his duties. However, it is only in a case of absence without leave or prior permission or without reasonable cause for a period exceeding seven working days that an officer shall be liable to disciplinary proceeding with a view to dismissal and reduction in rank in accordance with General Order 26. This is provided by General Order 21(4) which states:

> Where an officer is absent for a period exceeding seven working days in any calendar month, or exceeding seven working days consecutively, that fact shall forthwith be reported by the Head of Department to the Appropriate Disciplinary Authority together with the dates and the circumstances of the absence and any further information which may be required concerning the officer. Upon consideration of the said report, the Disciplinary Authority may then institute disciplinary action against the officer in accordance with General Order 26 with a view to dismissal

or reduction in rank. Pending the decision of the Disciplinary Authority, the officer shall not be entitled to any salary or remuneration for the period of his absence.

[25] Even in such a case the officer still stands a chance of not being dismissed. This is because under General Order 26(3), if after consideration of the representation made by the officer, the Disciplinary Authority is of the opinion that the conduct of the officer is not serious enough to warrant dismissal or reduction in rank, the Disciplinary Authority may impose upon the officer such lesser punishment as it may deem fit. On the other hand, absence without leave or prior permission or without reasonable cause for a period not exceeding seven working days does not necessarily result in the dismissal of the officer concerned. The appropriate Disciplinary Authority in a justifiable case, is empowered to initiate disciplinary action not with a view to dismissal and may impose such penalty as it may deem fit. This is provided by General Order 21(3):

> Where an officer is absent for a period not exceeding seven working days, in any calendar month, upon report by the Head of Department, the Appropriate Disciplinary Authority in cases where it is not considered justifiable to initiate disciplinary action with a view to dismissal, may deal with the officer in accordance with General Order 25 and impose such punishment as it may deem fit and in that event, he shall not be entitled to any salary or remuneration for the period of his absence.

[26] The position under ss 13 and 15 of the Employment Act 1955 is different. Section 13(2) of the Employment Act 1955 provides:

> Either party to a contract of service may terminate such contract of service without notice in the event of any wilful breach by the other party of a condition of the contract of service.

[27] Section 15 of the Employment Act 1955 provides for situations in which a contract of service shall be deemed to have been broken by an employer or employee. Section 15(1) provides that an employer shall be deemed to have broken his contract of service with the employee if he fails to pay wages in accordance with Pt III of the Act. In respect of an employee, s 15(2) of the Act provides:

> An employee shall be deemed to have broken his contract of service with the employer if he has been continuously absent from work for more that two consecutive working days without prior leave from his employer, unless he has a reasonable excuse for such absence and has informed or attempted to inform his employer of such excuse prior to or at the earliest opportunity during such absence.

[28] Thus, unlike under the G O 1980 Chapter 'D', under s 13(2) of the Employment Act 1955, there is no difference in treatment between a person who has been absent from work for a period not exceeding seven working days from a person who has been absent from work for a period exceeding seven working days. Under s 15(2) of the Employment Act 1955, as long as a person has been continuously absent from work for more than two consecutive working days without prior leave, and he has no reasonable excuse and has not informed or attempted to inform his employer of such excuse prior to or at the earliest opportunity during such absence, he shall be deemed to have broken his contract of service and his employer may dismiss him without notice under s 13(2) of the Employment Act 1955. This is the first difference between the procedure under G O 1980 Chapter 'D' and the procedure under s 15(2) read with s 13(2) of the Employment Act 1955.

[29] Secondly, under General Order 21(3) G O 'D' 1980, in a case where an officer is absent for a period of not exceeding seven working days, upon report by the Head of Department, the Appropriate Disciplinary Authority is empowered to start disciplinary action not with a view to dismissal, in accordance of General Order 25. Under General Order 25, the officer shall be informed in writing of the facts of the breach of discipline (ie the alleged absence from work for a period not exceeding seven working days) and that he be given an opportunity of making a representation in writing, against the allegation. After considering the representation of the officer concerned, the Appropriate Disciplinary Authority shall decide whether or not the officer is guilty of the alleged breach of discipline and if it determines that he is guilty thereof it shall consider to impose punishment other than dismissal or reduction in rank. Such a well laid and systematic procedures are not incorporated under ss 13 or 15 of the Employment Act 1955. In fact when an employee is deemed to have broken his contract of service under s 15(2) of the Employment Act 1955, his employer may dismiss him without notice under s 13(2) of the same Act. Under the G O chapter 'D' 1980, even for being absent for a period exceeding seven working days, a Government Officer cannot be dismissed without notice. This is clear from the provision under General Order 21(4) and General Order 26. At this point, I must add that the respondent did not have to adopt or comply with the provisions of the G O, Chapter 'D' 1980. It could if it so wished continue to use those provisions with the necessary modifications. It could also introduce and use some other provisions. The choice was for the respondent to make. But whatever the provisions the respondent chose to apply must not have the effect of subjecting its employees (who were former employees of the Telecommunication Department, Malaysia) to terms and conditions of service less favourable than the terms and condition of service to which they were entitled immediately before joining the respondent.

[30] In this case for the reason which I have explained, I hold that in applying the provisions under ss 13 and 15 of the Employment Act in dealing with the appellant's absence from work, the respondent had failed to comply with the mandatory standard provided under s 9(2) of Act 322, in that, in subjecting the appellant to the provisions under ss 13 and 15 of the Employment Act 1955, the appellant was made subject to procedures which were less favourable than the procedures relating to the same matter which he was entitled to immediately before joining the respondent. In my view, such failure of the respondent rendered the decision to dismiss the appellant illegal and/or procedurally improper. The decision is tainted with illegality because the respondent failed to have due regard and give effect to the legal standard incorporated under s 9(2) of Act 322. In the process of dismissing the appellant, the procedures used by the respondent must truly give effect to the mandatory words of the said section. To my mind those mandatory words regulate even the exercise of the power of dismissal by the respondent in this case. Explaining 'illegality' as a ground for judicial review, Lord Diplock said in *Council of Civil Service Unions & Others v Minister for the Civil Service* [1985] AC 374, at p 410:

> By 'illegality' as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justifiable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.

[31] Further or alternatively, I am also of the view that failure of the respondent to comply with mandatory words of s 9(2) of Act 322 also amounts to procedural impropriety as explained by Lord Diplock in *Council Of Civil Service Unions* at p 411:

> I have described the third head as 'procedural impropriety' rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice.

[32] The grounds which I have discussed so far are to my mind, sufficient for me to allow the appellant's appeal on the question of liability.

[33] What if I have erred in coming to my earlier conclusions? What if in applying the procedures under ss 13 and 15 of the Employment Act 1955 in dealing with the appellant's absence from work, the respondent had not violated the provision under s 9(2) of Act 322? In my view, even if ss 13 and 15 of the Employment Act 1955 were applicable, the eventual outcome of this case would still be the same. To commence my explanation on this I will revert to the submission made by the respondent's counsel. In his submission, he questioned whether the appellant was really sick on the 4, 5, 7 and 8 May 1993? He submitted that the only evidence available to prove that the appellant was sick on those dates was the evidence of the appellant himself. It was argued that the appellant did not produce any medical certificate to show that he was sick on those dates and that nobody else was called to testify in support of his evidence. The respondent's counsel contended that it was not safe for the court to rely on the evidence of the appellant alone to arrive at the finding that he was sick on those four days as claimed by him. In reply to the appellant's counsel plea for this court to do justice, the respondent's counsel submitted that justice must not be done only to the appellant, but also to the respondent. He submitted that if the court were to allow the appellant's appeal, it would encourage other employees of the respondent to be absent from work on the pretext of being sick. This, according to the respondent's counsel would disrupt the work system of the respondent. I regret to say that I am unable to agree. Each case would have to be considered and decided in the light of the facts and circumstances available in the case. From the evidence available, this is not an ordinary case of an employee wilfully shirking his duties by not going to work. In an ordinary case where an employee was absent from work, the words of the employee alone, without supporting evidence such as a medical certificate may not be sufficient to convince the court that he was sick. But in this case the circumstances are different. From the totality of the evidence recorded in the case, I find that on the days he was absent, the appellant was ill, and as I have said earlier, he had been ill from time to time and was in and out of hospital because he was suffering from what is medically known as Bi Polar illness. According to SP3, the Consultant Psychiatrist attached to the General Hospital in Kuala Terengganu, from the Hospital record, the appellant had been admitted into the ward of the General Hospital in Kuala Terengganu in 1980. The appellant was also treated in the Hospital in Kota Bharu for abnormal behaviour. According to SP3:

— patient suffering — hadapi penyakit — Bi Polar illness.

— Penyakit kecelaruan.

— Mood disorder — 2 polar … kadang-kadang menjadi terlalu high mood — sampai ciri-ciri hilang akal — boleh jadi naik — selepas itu — tukar rendah — depression — high mood — low mood.

— High mood — cakap besar, spending money, agresif, mengaku Nabi.

— ponteng kerja

— Low mood — rendah diri — tidak ada tenaga, hopeless, bunuh diri, low hide. (Emphasis added.)

[34] According to SP3, the appellant's condition could be stabilised with medication, without which his mood would change:

Boleh distabilkan dengan ubat. On drug medication, kalau tidak mood high/sedar.

[35] I find that in cross-examination, SPS's evidence was not seriously challenged. The cross-examination went on in this manner:

S: Berapa kali beri keterangan ?

J: Lupa — tapi beri keterangan kes dadah di Kemaman.

S: Kes Sakaiteri

J: 2 kali — termasuk ini 3 kali.

S: Tengok mood pesakit — high/low — setuju — pesakit alami symptom begini — jika bekerja — boleh ganggu tugas?

J: Boleh/setuju.

S: Penyakit boleh baik?

J: *Boleh distabilkan — tidak boleh baik*.

S: Ikut pendapat kamu — perlu dimedical board? Kenapa?

J: Berpandukan kes-kes yang semacam ini … kes-kes mental buat medical board di Hospital.

S: Ada terlibat?

J: Tidak ingat.

(Emphasis added.)

[36] Having considered his evidence concerning his qualification and working experience as recorded in the appeal record, I accepted SP3 as a competent expert witness to testify in this case. I also accepted his evidence regarding the illness of the appellant. The respondent did not call any expert to rebut the evidence given by SP3. Indeed, after considering the evidence given by witnesses called by the respondent, I came to the conclusion that the respondent knew all along the sickness suffered by the appellant and its effects on him. This can be seen from the evidence given by SD1, the appellant's supervisor. In examination in chief he said:

Sebagai Ketua di bahagian Yunit ACC keputusan masalah Othman hadapi dan fikiran tak berapa waras, kadang-kadang dia bawa pisau ... ada mengacau kakitangan lain — satu tindakan yang membahayakan kakitangan lain dan pernah 2 kali dia lakukan begitu — tak ingat tarikh, waktu pagi selepas 11.00 ke atas — minta dia balik ke rumah.

Semasa hadapi penyakit — prestasi kerja tak boleh buat apa-apa kerja, tak boleh arahkan dia — emosi dia tengah marah.

Ada keadaan dia ganggu kakitangan lain dan ada aduan diterima — ugut dengan pisau, tak mahu kakitangan di bahagian dan rekod-rekod buat kerja yang tertinggal atas meja dia.

[37] In his evidence under cross-examination, SD1 admitted that he had knowledge of the appellant's illness:

Soalan: Setuju — penyakit Othman Ali — adalah dipengetahuan kamu?

Jawapan: Saya tahu.

[38] In his evidence, SD1 also said that to his knowledge, the appellant had received medical treatment. SD1 also said in his evidence in examination in chief that with doctor's advice and medication, the appellant could perform his duties well:

Othman bagi saya — boleh jalankan tugas dengan baik, tapi denaan syarat — perlu patuhi nasihat doctor, makan ubat — terjadi — dia tak ambil ubat — perwatakan berubah.

[39] SD1 maintained the same version in cross-examination:

Soalan: Pada pandangan kamu — Othman Ali boleh jalankan tugas?

Jawapan: *Pada masa dia bertugas di bawah saya, makan ubat, boleh bertugas dengan memuaskan.*

(Emphasis added.)

[40] I find that SD1 knew that on 4, 5, 7 and 8 of May 1993, the appellant was absent from work because he was sick. I also find that SD1 knew that the contents of the appellant's show cause letter dated 14 May 1993 was true, but SD1 contended that the appellant had to inform the respondent which the appellant failed to do. This is revealed by SD1's evidence under cross-examination:

Soalan: *Apabila Othman beri surat — 14 Mei 1993 — menyatakan sebab-sebab … dan surat itu — setuju — apabila tahu dia ada penyakit — kandungan benar?*

Jawapan: *Ya, kandungan benar … tapi dia tak beritahu masalah pada hari itu — mesti beritahu … saya kata — pemberitahuan itu penting.*

Soalan: Anggapan — Othman serius?

Jawapan: Tak serius ... tapi melalui pengamatan saya, serius dan bermusim.

(Emphasis added.)

[41] In the circumstances of this case I do not think that failure of the appellant to produce any sick certificate had weakened his case. On the evidence available before the court, I have no hesitation in concluding as a fact that the appellant was sick on 4, 5, 7 and 8 May 1993. SD1 knew that the appellant had bouts of Bi Polar illness on those days, but as far as the SD1 was concerned, the appellant had failed to inform him of his illness on those dates. It would seem that as far as the respondent was concerned, that failure of the appellant to inform was a very serious mistake warranting his dismissal. There is no doubt that in taking that stand, the respondent was relying on the material words under s 15(2) of the Employment Act 1955:

... and has informed or attempted to inform his employer of such excuse prior to or at the earliest opportunity during such absence.

[42] In his judgment, the learned sessions court judge seemed to agree with the stand taken by the respondent when he said:

> In the instant case, the learned counsel for the plaintiff conceded that the plaintiff had not explained why he had failed to inform the defendant company of his excuse for his absence from work. Surely in this age of modern telecommunication, it does not take much for the plaintiff to have informed his employer about his inability to come to work.

[43] With respect, considering the evidence available in this case, I have a different view. No doubt there were modern means of telecommunication available to the appellant. But what is the use of having modern or for that matter even sophisticated means of communication at one's disposal if one's physical and mental condition are not stable rendering one incapable of utilising them? This, in essence was what the appellant was pleading for in this case. His plea is supported by what he said in his show cause letter:

> Sebab-sebab saya tidak hadir di pejabat pada hari-hari Selasa, Rabu, Jumaat dan Sabtu, iaitu 4, 5, 7 & 8 Mei 1993 beralasan seperti berikut:
>
> (1) *Keadaan fizikal dan mental pada hari-hari tersebut tidak begitu stabil dan tenteram mungkin kerana saya mengambil ubat yang berlebihan.*
>
> (2) *Pada hari-hari tersebut saya tidak boleh memandu dan mengawal kenderaan saya.*

[44] This evidence was not disputed or challenged in any way by the respondent. Indeed, as I have pointed out, in his evidence in cross-examination, SD1 accepted the contents of the appellant's show cause letter as true. However, if corroboration is necessary, it is amply provided by the evidence of SP3:

> Patient suffering — hadapi penyakit — Bi Polar illness.
>
> — Penyakit kecelaruan.
>
> — *Mood disorder — 2 polar ...*
>
> *Kadang-kadang menjadi terlalu high mood — sampai ciri-ciri hilang akal — boleh jadi naik — selepas itu — tukar rendah — depression — high mood — low mood. High mood — cakap besar, spending money, agresif, mengaku Nabi.*
>
> — *Ponteng kerja.*
>
> *Low mood — rendah diri — tidak ada tenaga, hopeless, bunuh diri. low hide.*
>
> (Emphasis added.)

[45] I find that the learned sessions court judge had erred in failing to take into account the evidence which I have just set out. In my judgment, that evidence is sufficient to support the finding that because of his unstable physical and mental condition on 4, 5, 7 and 8 of May 1993, the appellant was not in the position to inform or attempt to inform the respondent on those dates or the earliest opportunity available, although he did explain in his show cause letter which he sent to and was received by respondent on 14 May 1993. Ido not think that this is a case of a wilful breach of contract of service. Wilful means intentional or deliberate. In the light of the evidence relating to the appellant's illness, particularly his unstable mental state, the element of intention

or deliberation necessary to constitute a wilful breach was lacking. This brings me back to s 15(2) of the Employment Act 1955. The question is whether under that section, the requirement to inform or attempt to inform the employer must still be fulfilled (by an employee seeking to rebut the deeming provision thereunder), even if that employee is incapable of doing so because of his unstable physical and mental condition (due to sickness which had resulted in his absence from work for more than two consecutive days)? In my view, the answer is in the negative. It would be absurd to insist on that requirement in a case of an employee who, due to certain physical and mental condition caused by an illness, is rendered incapable of informing or attempting to inform his employer of his absence from work because of that illness. I do not think that the legislature had intended that the requirement to inform under s 15(2) of the Employment Act 1955 must be fulfilled even if the employee concerned is incapable of doing so because of his unstable physical or mental condition. In my view, adhering to the ordinary words of s 15(2) of the Employment Act 1955 in interpreting the requirement to inform provided thereunder would result in absurdity or repugnance. So, the language of the section must be varied or modified to give it 'force and life' and to achieve what must have been the intention of the legislature (Parke B in *Becke v Smith* (1836) 2 M&W 191 at p 195, *Sukma Darmawan Sasmitaat Madja v Ketua Pengarah Penjara, Malaysia & Anor* [1999] 2 MLJ 241, *Lim Moh Joo v Public Prosecutor* [1970] 2 MLJ 113, at p 114).

[46] Even if my interpretation of s 15(2) is not accepted and that section required that an employee concerned must inform or attempt to inform his employer of his sickness regardless of the seriousness of his illness, I am satisfied that the eventual outcome of this case would still be the same. In my view, this is because considering the nature of the illness suffered by the appellant resulting in his unstable physical and mental condition as seen from the evidence which I have set out, which even SD1 admitted in his evidence, it would be unfair and irrational to dismiss the appellant, who had otherwise given good service to Telecommunication Department, Malaysia and the respondent for 21 years, substantially because (as SD1 said in his evidence) the appellant failed to inform or attempted to inform the respondent of his illness on the four material days. In this regard, in explaining the meaning of 'irrationality' being a ground of impugning a decision susceptible to judicial review, in the case of *Council of Civil Service Unions & Ors v Minister for the Civil Service* Lord Diplock said (at p 410):

> By 'irrationality' I mean what can by now be succinctly referred to as '*Wednesbury* unreasonableness' (*Associated Provincial Picture Houses Ltd. v Wednesbury Corporation* [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.

[47] Careful consideration of the circumstances of this case leads me to the conclusion that the decision to dismiss the appellant is one such decision.

[48] It is therefore clear to me that even on this alternative ground too the termination of the appellant's service was wrongful.

[49] Before leaving the question of liability, there is still another ground which must be discussed. In my view, standing by itself this ground alone is also sufficient to form the basis for holding that the dismissal of the appellant was wrongful. This relates to the violation of the rules of natural justice. I must commence addressing this point by straightway asking the question whether the appellant's absence from work for the four material days was actually the real and/or the sole reason for dismissing him. In searching for the answer, reference must be made to the respondent's letters dated 10 May 1993 and 11 May 1993 to the appellant, the appellant's letter dated 14 May 1993 to the respondent, the respondent's termination letter dated 11 June 1993, as well as SD1's and SD3's evidence.

[50] In the letter dated 10 May 1993, the respondent alleged that the appellant was absent from work on 4, 5, 7 and 8 May 1993. That clearly was the sole breach of conduct alleged by the respondent therein. It is also clear that in the said letter, the appellant was given seven days (from 10 May 1993) to give reason as to why disciplinary action could not be taken against him. The said letter warned the appellant that if reasonable excuse was not given for the absence, disciplinary action would be taken against him.

[51] The respondent's letter dated 11 May 1993 also confirms that absence from work as stated in the appellant's letter dated 10 May 1993 and nothing else, was the 'charge' against the appellant. The explanation given by the appellant in his letter dated 14 May 1993 was explanation for that charge. The termination letter dated 11 June 1993 clearly says that the explanation given by the appellant in his letter dated 14 May 1993 was not reasonable and that therefore his service with the respondent was terminated under s 13(2) of the Employment Act 1955 with effect from the date of the letter (11 June 1993). The content of the said letter of termination is now reproduced:

> PER: PENAMATAN PERKHIDMATAN
>
> Adalah saya merujuk kepada surat Penolong Pengurus Unit Kejuruteraan, ORT Selangor Timur, Kawasan Tengah, Kuala Lumpur, ruj: 71 ORT ST/KEJ. SULIT bertarikh 10 Mei 1993 yang meminta tuan memberikan penjelasan mengapa perkhidmatan tuan tidak boleh dianggap telah tamat kerana kegagalan tuan untuk hadir bekerja melebihi daripada dua (2) hari kerja berturut-turut, iaitu mulai tarikh 04.05.93.
>
> Dukacita dimaklumkan bahawa setelah menimbangkan alasan-alasan yang diberikan melalui surat tuan yang bertarikh 14.05.93, adalah didapati alasan-alasan tersebut tidak munasabah dan oleh kerana itu perkhidmatan tuan dengan Syarikat ini tamat dengan sendirinya mengikut Seksyen 13(2) Akta Kerja 1955, berkuatkuasa mulai daripada tarikh surat ini. Dengan keputusan di para dua (2) di atas, sila tuan kembalikan Pas Kad, Kad Rawatan Perubatan dan sebarang harta benda Syarikat yang lain yang telah dibekalkan kepada tuan semasa perkhidmatan tuan dengan Syarikat.
>
> Segala baki gaji tuan, jika ada, dengan Syarikat ini akan dijelaskan setelah kami menerima surat penyelesaian mengenai cukai pendapatan tuan dari Jabatan Hasil Dalam Negeri.
>
> Menurut perenggan 10 kepada Tatacara Tatatertib Syarikat, tuan berhak membuat rayuan untuk dipertimbangkan semula hukuman yang dikenakan itu kepada:

Pengerusi
Jawatankuasa Rayuan Tatatertib
Bagi Anggota-Anggota Bukan Eksekutif
Bahagian Sumber Manusia
Tingkat 19, Wisma Telekom
Jalan Pantai Baru
59200 Kuala Lumpur.

dalam tempoh tiga puluh (30) hari dari tarikh surat ini.

[52] But was absence from work for the four material days for which the appellant's explanation was found to be unreasonable (as stated in the termination letter) the real and/or the only reason as to why the appellant was dismissed? In my view, the answer is provided by SD3's evidence in cross-examination. The relevant part of the cross-examination runs as follows:

S: Unsur dalam prosedur penamatan — inquiry dibuat?

J: Dalam kes misconduct, rujuk s 14 Akta Kerja 1955, ada inquiry.

S: Kes ini timbul inquiry?

J: Oleh sebab kejadian Seksyen 15(2) dan Seksyen 13(2) tidak buat inquiry.

S: Adakah kes penamatan ini merupakan kesalahan serius sekali?

J: Kebiasaan jika tempoh tak bertugas tak lama, biasa beri peluang, tapi dalam kes ini, beri beberapa peluang sebelum itu — rujuk untuk rawatan — rujuk untuk periksa perubatan — atas jawapan adik — keadaan biasa — tidak ada penyakit dan boleh terima alasan dan arah kembali kalau pengurus kata hak merayu tamat.

S: Pernah berlaku — rujuk kepada panel doktor?

J: Kes selepas ini — ini pertama kali.

S: Benar, saya katakan, semasa surat penamatan dikeluarkan terhadap Othman Ali, ia di dalam atas sebab tak datang kerja dua hari berturut-turut?

J: Alasan tak datang kerja dua hari berturut-turut dan atas fakta dia diberi peluang dapat rawatan sewajarnya, ini kali kedua lakukan kesalahan dan selepas laku kesalahan pertama dijawab adik — penyakit — rujuk kepada panel rawatan diperiksa oleh pakar atas laporan dan diberi peluang untuk baiki keadaan dan setelah diberi peluang, lakukan kesalahan yang sama, rujuk kepada ibu pejabat syor ditamatkan perkhidmatan.

S: Adakah semasa surat diserahkan — puashati — Othman tak punyai penyakit gila serius (D8)?

J: Tak kata dia normal, dia ada penyakit, tapi dengan makan ubat, boleh kawal penyakit, tapi dia tak makan ubat.

[53] So, that is the answer. Actually, absence from work for more that two consecutive days was the first reason why the appellant was dismissed. The second reason was that earlier, he had been given the opportunity to get medical treatment and was referred to the respondent's expert doctor, acting on whose report the appellant was given another chance to improve himself. Yet he committed the same offence again. The evidence on the earlier opportunity

given to the appellant to get treatment is provided by SD3 in his evidence in examination-in-chief:

> Penamatan Othman berlaku kerana tak hadir bertugas — keluar surat tunjuk sebab — selepas keluar surat pertama, lapuran diterima selepas itu, katakan adik kepada Othman beri surat jawapan kepada surat bagi pihak Othman, kata Othman hadapi penyakit otak — atas maklumat saya nasihat Ketua Bahagian panggil anggota balik bertugas dan uruskan dirujuk ke Hospital, untuk rawatan lanjut.
>
> Ketua Bahagian bawa dia ke Hospital Kuala Lumpur untuk rawatan, saya minta Ketua Bahagian — laporan setiap tiga bulan sekali, kerja dan kelakuan … dipenuhi ... kata ambil ubat ikut ditetapkan.
>
> — ada improvement samping dirujuk kepada Hospital. Dalam pada itu, saya telah dimaklumkan keadaan dia — rujuk supaya diperiksa oleh doktor panel syarikat, keadaan dia boleh bertugas atau disarakan atas sebab kesihatan rujuk kepada doktor panel — rujuk kepada pakar sakit jiwa.
>
> Surat Saikiatris — 27 November 1992 — muka 6.
>
> — dicamkan.
>
> Kesimpulan — jika makan ubat — regularly — surat dirujuk ... maka kes dia boleh dikawal jika makan ubat dan penyakit tidak merebak di mana atas sebab kesihatan.
>
> Kesan daripada laporan doktor — saya telah keluar surat kepada Othman — nasihatkan beliau, apa disebut pakat tadi — makan ubat 'regularly' jadi pekerja yang baik.
>
> Saya keluar satu surat nasihat di hantar melalui Ketua Bahagian, sejurus selepas surat diterima, mungkin makan ubat tak tentu penyakit bermula kembali.
>
> Surat dirujok: dicamkan.
>
> — surat: D8
>
> — 8 April 1993

[54] Acting on the doctor's report, SD3 had issued a letter of advice to the appellant. In that letter dated 8 April 1993 (exh D8] it was acknowledged that the service and conduct of the appellant was satisfactory. In that letter SD3 also advised the appellant to go for follow-up treatment regularly and to take medicine as prescribed by doctors. The content of the letter is as follows:

> 8 April 1993
>
> Encik Othman Bin Ali
>
> KP 4031391
>
> Juruteknik Tingkatan Biasa
>
> LAPORAN KERJA DAN KELAKUAN
>
> Lanjutan kepada surat pejabat ini bilangan 23 dalam siri yang sama bertarikh 9Januari, 1993 berhubung dengan laporan kesihatan tuan, adalah dimaklumkan bahawa laporan telah diterima yang menyatakan bahawa kerja dan kelakuan tuan semasa menjalankan tugas-tugas harian tuan adalah memuaskan. Walau bagaimanapun, masih ada ruang untuk tuan memperbaiki lagi kedudukan tuan sebagai seorang pekerja di Syarikat ini untuk memberi sumbangan yang lebih bermakna lagi.

Dengan itu, tuan adalah dinasihatkan supaya mendapatkan rawatan ulangan mengikut jadual yang telah ditetapkan oleh pihak berkuasa Hospital dan seterusnya memakan ubat menurut aturan yang telah ditetapkan. Semoga dengan pemakanan ubat yang teratur serta rawatan ulangan menurut jadual, tuan dapat memperbaiki lagi kerja dan kelakuan tuan dalam masa menjalankan tugas harian tuan.

Adalah diharapkan dengan nasihat yang telah diberi itu, pejabat ini akan mendapat laporan yang lebih memuaskan mengenai kerja dan kelakuan tuan di masa hadapan.

Sekian, salam hormat,

tt

LARKHAN MOHAMAD BIN MOHAMAD

Pen Pengurus Hal Ehwal Pekerja

Bp Pengurus Personel

Telekom Malaysia

Kawasan Tengah

KUALA LUMPUR.

sk. Pengurus Unit

ORT Selangor Timur

(UP ENCIK NOR AZMI BIN HUSSIN)

Surat tuan bilangan 67 ORT ST/KEJ SULIT bertarikh 02 April, 1993 berkenaan dengan perkara yang tersebut di atas adalah dirujuk.

Sila awasi gerak geri penama di atas selama tiga (3) bulan lagi mulai dari tarikh surat ini dan kemukakan laporan sulit secara karangan mengenai kerja dan kelakuan beliau.

[55] A copy of that letter was sent to Pengurus Unit ORT Selangor Timur (for the attention of En Nor Azmi Hussin) with the direction to En Nor Azmi to observe the conduct of the appellant for three months from the date of the letter (8 April 1993) and there after to submit confidential report in writing on the conduct and work of the appellant. Unfortunately, before the three months' period of observation (which SD3 had graciously allowed in the appellant's favour) was over, the respondent decided to dismiss the appellant because the latter had not improved himself after being given the opportunity.

[56] Looking at the whole circumstances, to me the second reason was the real reason as to why the respondent decided to dismiss the appellant. Arising from this, the next question is — was the appellant aware of the second reason for his dismissal? To me the answer is that he was not aware. The rules of natural justice and fair play demanded that the material facts supporting the second reason must be included in the charge against the appellant and that he has been given reasonable opportunity of giving his explanation for it. This, the respondent had failed to do. As far as the appellant was concerned, from the respondent's letters dated 10 May 1993, 11 May 1993 and 11 June 1993, the only charge against him was being absent from work on the four material days. He had given his explanation to the said 'charge' which was found by the respondent to be unreasonable. As far as the appellant was

concerned, he was dismissed on the said 'charge'. The said charge did not mention anything about the facts relating to the second reason for his dismissal. The effect to my mind is obvious — the appellant was dismissed for something he was not 'charged' with in the first place, and in respect of which he was not given the chance to give explanation. This clearly amount to violation of the rules of natural justice which had occasioned injustice and grave prejudice, to the appellant. Support for my view can be derived from the Privy Council judgment in *Board Of Trustees Of The Maradana Mosque v Badiuddin Mahmud & Another* [1967] 1 AC 13 and *Lau Liat Meng v Disciplinary Committee* [1968] AC 391.

[57] In *Board Of Trustees Of The Maradana Mosque*, the brief facts reveal that in 1961 the appellants were charged with failure to pay certain teachers July salaries by 10 August in breach of s 6(i) of the Assisted Schools & Training Colleges (Special Provision) Act 1960. On 11 August, the appellants were invited by a letter from the director to show cause why the school should not be taken over for director management. The letter alleged breach of para (i) but made no reference to para (k). On 15 August, the appellants showed cause, and on 21 August by the order challenged, made under s 4 of the Assistant Schools & Training Colleges (Supplementary Provisions) Act 1961, the school was taken over for director management on the ground that s 6(i) had been violated. Some two months later, the Minister broadcast a statement, subsequently published as an official paper, in which he gave 'the reasons for the takeover' of the school and said it was clear from the appellants' letter showing cause that they had also been disregarding para (k). It was held that since the imputed failure to satisfy the requirement of para (k) had played an important part in the Minister's decision, as his broadcast showed, the Minister, in failing to notify the appellants that any complaint was being made under that head, or of giving them an opportunity to meet the charge, had violated the rules of natural justice. In his judgment at pp 24–25, Lord Pearce said:

> They had, however, no notification that any complaint was being made under s 6(k), which is a different and, in this case, more far-reaching matter. If, therefore, an imputed failure under s 6(k) can be shown to have played a material part in the Minister's decision, the appellants were not fairly treated.
>
> The learned Solicitor-General argues forcefully that a political speech is no adequate evidence for establishing that s 6(k) formed an important part of the Minister's decision. He relies on *Franklin*'s case ([1948] AC 87). But the *dicta* in that case are not near enough to the facts of the present case to provide an analogy. Here the Minister presented a serious and detailed statement (in a broadcast which was printed as a government paper) 'giving the reasons for the take-over of Zahira College' There seems, therefore, no reason to doubt the truth of the Minister's own assertion that the appellants' contravention of s 6(k) played an important part (and, it may well be, the most important part) in his decision to make the Order.
>
> When an appellant is applying to quash an Order on the ground that there was an infringement of the rules of natural justice, he is not confined to the face of the record. He may establish his case from other reliable evidence. In their Lordship's view it is sufficiently established by the government paper that the Minister in making the Order was largely influenced by an alleged contravention of which the appellants had no notice.

Whether it could be a valid answer to say that the appellants had in truth no defence, even if they had been given an opportunity of presenting it, need not be considered. That point was left open in *Ridge v Baldwin* ([1964] AC 40). In the present case their Lordships cannot assume that the appellants had no means to satisfy the provisions of s 6(k).

[58] *Lau Liat Meng v Disciplinary Committee* is a case concerning an appeal from the decision of the High Court of Singapore, Constituted under s 30(7) of the Advocates and Solicitors Ordinance dated 28 February 1966, ordering that the appellant be struck off the role of advocates and solicitors of the High Court of Singapore. The facts of the case as in the headnotes are as follows:

The Motor Vehicles (Third Party Risks and Compensation) Ordinance 1960, s 17(2), provided that only advocates and solicitors might act in actions for damages for death arising out of the use of a motor vehicle or negotiate or settle claims and actions arising therefrom. By s 17(3):

> 'Notwithstanding the provisions of any other written law any costs payable to ... an advocate and solicitor acting in respect of the matters referred to in subsection (2) ... shall be taxed and such ... advocate and solicitor shall not receive or accept any payment of money for so acting other that such taxed costs.'

The appellant, who was called to the Singapore Bar on 9 November 1962, was a member of a firm of advocates and solicitors until December 1963, when he started practice on his own account. On 7 August 1963, a boy was knocked down and killed by a bus owned by the Singapore Traction Co Ltd. On 11 September 1963, W, the boy's father, executed a warrant in favour of the appellant's firm 'for the purpose of obtaining probate and claim damages for loss of my son'. After the appellant had started practice on his own account, W, executed a further warrant on 11 January 1964, in favour of the appellant personally and declaring that no special agreement had been made between them regarding costs. The appellant, as a member of the firm, had attended the coroner's inquest on 14 November 1963, and had conducted negotiation regarding damages with the bus company's solicitors; and the claim was settled for $4,000. W had authorized the appellant to pay to himself all party and party costs received and on 22 January 1964, the bus company's solicitors paid over to the appellant $500. Although the claim had been settled without instituting an action, there was a taxation of these costs on a party and party basis at $500. Asolicitor and client bill was separately taxed by the appellant before another registrar at $705.50. The payment of $705.50 by W overlapped the payment of $500 by the bus company's solicitors. Apart from these two sums, a further $700 was paid by W to the appellant as agreed costs for his attendance at the coroner's inquest and at the prosecution of the bus driver, but the appellant returned $350 of this sum as he had not in fact attended the prosecution.

On January 18, 1964, the appellant wrote on behalf of W to the bus company's solicitors:

> We have now received instructions to accept your clients' offer of ... $4,000 in full settlement ... and $500 towards our agreed party and party costs ... you will now forward your clients' cheque for $4,000 to the Public Trustee and our agreed party and party costs directly to us.

The statement regarding the $500 was untrue and the appellant admitted in cross-examination that W was unaware that the appellant had received such sum.

A disciplinary committee of three members was appointed by the Chief Justice to investigate a complaint of grossly improper conduct made by the Bar committee against the appellant. The charge against the appellant related (1) to the acceptance of $700, contrary to s 17(3), and (2) to entering into a champertous agreement with W to take 25 per cent of the damages, if any were recovered, by way of remuneration for his service. No charge was preferred in respect of the $500. No amendment

was sought after the appellant had made his admission. Nevertheless, the disciplinary committee held against the appellant, on the grounds (1) that he had received an additional sum of $500 over and above the solicitor and client costs recoverable by him whereas it should have formed part of those costs and should have been disclosed; (2) that the charge of champerty was proved against the appellant. The High Court on appeal, in accepting the findings of the disciplinary committee, stressed the non-disclosure of the $500, and pointed out that the appellant had therefore received two sets of taxed costs in respect of the claim for compensation, $500 on the party and party bill, and $705.50 on the solicitor and client bill.

[59] In delivering the judgment of Privy Council, Lord Hodson said at pp403–404:

> Notwithstanding that no charge had been made in respect of the $500 the disciplinary committee held against the appellant as one of the grounds for their opinion that he was guilty of grossly improper conduct in the discharge of his professional duty that he had contravened s 17(3) of the Motor Vehicles Ordinance 1960. In this respect also the High Court confirmed the finding and opinion of the disciplinary committee.
>
> Since the $500 bill had been taxed there was no contravention of the section save in so far as it was contravened by the money having been paid before taxation. This of itself would not be likely to be made the subject of a serious charge involving being struck off the roll of advocates. The contravention of the section was regarded by the disciplinary committee as consisting of receiving an additional sum of $500 over and above the solicitor and client costs recoverable by him, whereas it should have formed part of those costs. Not only was the appellant not charged with this offence but it cannot be treated as a breach of section 17(3) of the Motor Vehicles Ordinance, 1960, unless the taxation of the $500 bill be treated as a nullity, which their Lordships are not prepared to do on the information available. The only heading under which the $500 could have been thought to be included in the statement of case would be paragraph 8(i) and (ii), which concerned the payment of the $700 by Cham Siew Wai which was not subject to taxation under the Ordinance. The payment of the $500 was, moreover, not made by Cham Siew Wai but by the solicitors for the Singapore Traction Co Ltd.
>
> While acknowledging the gravity of the admission made by the appellant as to his $500 which he put into his own pocket without disclosure to his client and as to which he gave no satisfactory explanation, *it must be recognized that he was not charged either with having made excessive charges for professional work or having committed any specific fraudulent act.* The case against him was contained in the statement quoted above which was made pursuant to r 2 of the Advocates and Solicitors (Disciplinary Proceedings) Rules 1963. It was once amended but no amendment was made or sought to be made after the appellant had made his admission (see r 10 of the same rules, which expressly provide for amendment of or addition to the case). *Formal amendment might have been dispensed with provided adequate notice of the charge had been given, but natural justice requires adequate notice of charges and also the provision of opportunity to meet them. This requirement was not met.*
>
> *Their Lordships are accordingly of opinion that it would be unjust to allow the finding with regard to the $500 to stand.* If disciplinary proceedings are hereafter at any time taken against the appellant in respect of this sum no conviction or acquittal will stand in their way, for no charge relating to this matter has ever been made.
>
> (Emphasis added.)

[60] In conclusion, on the question of liability, the appellant's appeal is allowed.

QUANTUM

[61] In his statement of claim the appellant prayed for the following:

(a) 'Gantirugi ke atas jumlah gaji plaintif sebanyak RM1,447 sebulan daripada tarikh penamatan perkhidmatan dan seterusnya, setakat mana jumlah gantirugi tersebut di dalam bidang kuasa Mahkamah yang mulia ini;

(b) gantirugi am;

(c) faedah 8% setahun yang dikira ke atas gantirugi (a) dan (b) dan daripada tarikh penghakiman sehingga penyelesaian penuh;

(d) kos guaman;

(e) kos bagi tindakan ini;

(f) lain-lain relif mahkamah yang mulia fikirkan patut dan sesuai diberi.'

[62] In his submission the appellant's counsel prayed that the appellant be granted:

(i) the sum of RM208,368 being the salary of the appellant from April 1993 until 2005.

(ii) Gratuity of RM200,000 calculated from 1972 until 2003,

(iii) RM43,930.92 being the amount of EPF which should be paid to the appellant calculated on the basis of 12% of his salary (RM1,447 x 12 x 12).

[63] The appellant's counsel also submitted that the respondent should pay all arrears of SOCSO payment.

[64] I find that the appellant had not adduced sufficient evidence to establish to the satisfaction of the court that he was entitled to gratuity. There is also no evidence to prove how much gratuity was supposed to be paid to him. Ihave said elsewhere in this judgment that the appellant did not adduce evidence to show what were the details of the option which was given to him when he joined the respondent. While the absence of such evidence could not prevent the court from coming to the conclusion that the appellant must have opted to serve as an employee of the respondent under s 9(1) of the Act 322, (because the evidence available coupled with certain legal provisions which the court must take judicial notice of, has enabled the court to conclusively make such finding), the absence of such evidence had deprived the court of the materials necessary to make the finding relating to the appellant's entitlement as to gratuity and the quantum thereof. The details of the option would have proven the arrangement as to the payment of gratuity and the basis of calculation. Those details would also have provided the arrangement as to the payment of pensions and the basis of calculation thereof. I therefore make no award on gratuity and pensions.

[65] On the payment of EPF, again I could not find sufficient material in the evidence adduced by the appellant to justify the making of the award on the sum RM43.930.92 prayed for. Here again the details of the option given to and chosen by the appellant would have assisted a great deal. Accordingly, I make no award on EPF. For similar reasons, there will also be no award on SOCSO.

[66] This leaves the award in respect of salary unpaid to the appellant since the date of his dismissal. In his evidence the appellant said that while

he was in the service of the respondent, his last drawn salary was RM1,447. This evidence was not disputed or challenged in any way by the respondent. I accept this evidence. If he was not dismissed by the respondent, the appellant would continue to receive the monthly salary of RM1,447 per month, although he could also be entitled to certain yearly increment. Since no evidence was adduced to show what the yearly increment would be or the contingencies that would dictate the granting of that increment, I will only use the appellant's last drawn salary for the purpose calculating arrears of his unpaid salaries. The appellant's service was terminated with effect from 11 June 1993. However, from 11 May 1993 he was prohibited from coming to work. Since the respondent did not accept the appellant's explanation for being absent from work on 4, 5, 7 and 8 of May 1993, the respondent would have forfeited the salary for those dates and indeed the appellant probably had not been paid the salary for the whole month of May 1993. So, although his dismissal was effective from 11 June 1993, for the purpose of calculating the appellant's unpaid salaries, the date 1 May 1993 will be used as a starting point. In my view, he is entitled to the unpaid salaries from 1 May 1993 to 30 November 2003 — a total 127 months. So there will be judgment in the sum of RM183,769 (ie 127 x RM1447) in his favour.

[67] Will there be an award of salaries from the date of judgment (2 December 2003) until the date on which the appellant would have reached the compulsory date of retirement? If the appellant's date of birth was established it would have been possible to determine the more precise date on which he would reach the compulsory retirement age. In such a case post judgment award based on the last drawn salary may be considered until the date on which the appellant would reach the compulsory date of retirement. Unfortunately, no such evidence was adduced by the appellant and there is therefore uncertainty as to the date on which the appellant would have reach the compulsory date of retirement. Therefore there will no further award on that basis.

CONCLUSION

[68] The respondent is ordered to pay the appellant:

(1) the sum of RM183,769;

(2) interest of 8%pa on the sum of RM183,769 from 1 May 1993 until the said amount is paid in full, and

(3) Costs of this appeal.

Appeal allowed with costs..

Reported by Sugandra Rao